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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMETRIUS JOHNSON et al.,

Defendants and Appellants.

C084040

(Super. Ct. No. 15F03124)

A jury found defendants Demetrius Johnson and David Bell each guilty of three counts of robbery along with various accompanying firearm enhancements. On appeal Johnson and Bell argue remand is required to allow the trial court to exercise its newfound discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620) to strike the firearm enhancements. Bell separately contends the trial court erred in imposing consecutive terms without stating reasons on the record. We will remand to allow the trial court to consider exercising its discretion under Senate Bill 620 as to both defendants. We will also modify the judgment to correct several sentencing errors as well as correct some clerical errors. We otherwise affirm.

BACKGROUND

Together, Johnson and Bell robbed two liquor stores. The first liquor store had two victims, the second liquor store had one. During the second robbery, Johnson shot the victim.

The first robbery

In the early evening, two clerks were working in a liquor store when Johnson and Bell came into their store. At one point, defendants each took a baseball cap and started to leave the store without paying. When a clerk tried to stop them, Bell lifted his shirt to show a gun.

The second robbery

That same night, Johnson and Bell went to a second liquor store. They asked the clerk for a bottle of Hennessy. Without producing money, Johnson demanded the clerk put the bottle on the counter. When the clerk failed to do so, Bell went behind the counter and took the bottle.

The clerk picked up a baseball bat. As he did, he heard the sound of a gunshot coming from Johnson's direction. The clerk then began hitting a shelf with the bat, to scare the robbers away. He then watched Johnson point the gun at him and heard another shot. The clerk was shot in the forearm.

Jury verdict and sentencing

A jury found both Johnson and Bell guilty of three robbery counts. (Pen. Code, § 211.)¹ Counts one and two pertained to the first robbery; count three pertained to the second robbery. As to Bell, on counts one and two, the jury found he had personally used a firearm. (§ 12022.53, subd. (b).) As to count three, it found a principal was armed with a firearm during the commission. (§ 12022, subd. (a)(1).)

¹ Undesignated statutory references are to the Penal Code.

As to Johnson, on counts one and two, the jury found a principal was armed with a firearm. (§ 12022, subd. (a)(1).) As to count three, it found Johnson had personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury. (§ 12022.53, subd. (d).)

The trial court sentenced Bell to a 13-year four-month aggregate term: the two-year low term, along with a 10-year firearm enhancement (§ 12022.53, subd. (b)) on count one; a concurrent one-year term (one-third the middle) along with a four-month enhancement (one-third the term) (§ 12022, subd. (a)(1)) on count two;² and a consecutive one-year term (one-third the middle) along with a four-month enhancement (one-third the term) (§ 12022, subd. (a)(1)) on count three. (RT 366-367)

Johnson was sentenced to a 25-year-to-life indeterminate term along with a 15-year four-month determinate term. It consisted of a 10-year term (the upper term doubled for the strike) along with a one-year enhancement (§ 12022, subd. (a)(1)) on count one; a consecutive two-year term (one-third the middle, doubled for the strike) along with a four-month enhancement (one-third the term) (§ 12022, subd. (a)(1)) on count two; and a consecutive two-year term (one-third the middle, doubled for the strike) along with a 25-year-to-life enhancement (§ 12022.53, subd. (d)) on count three.³

DISCUSSION

On appeal, Johnson and Bell contend remand is required in light of Senate Bill 620. Bell separately contends remand is also required because the trial court failed to

² This was error. A concurrent term receives a full term. (See *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.)

³ This was also error. Because count three contains the longest term, it should have been made the principal term. (See *People v. Brady* (1995) 34 Cal.App.4th 65, 70, fn. 9.)

articulate reasons for imposing consecutive terms. Additionally, several sentencing errors and clerical errors on the abstracts of judgment have come to light.

I

Johnson's Senate Bill 620 claim

Johnson contends his case must be remanded in light of Senate Bill 620, which amends section 12022.53 to afford a trial court discretion to strike a firearm enhancement in the interest of justice. The People agree that Senate Bill 620 applies retroactively but maintain remand would be futile. We agree with Johnson.

Prior to January 1, 2018, an enhancement under section 12022.53 was mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h) (Stats. 2010, ch. 711, § 5); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.) Senate Bill 620 amended section 12022.53, subdivision (h) to permit the trial court to strike firearm enhancements imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

Senate Bill 620 applies retroactively. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [remanding pursuant to the amended section 12022.53]; see also *In re Estrada* (1965) 63 Cal.2d 740, 744.) Here, the amendment took effect before Johnson's and Bell's convictions become final. Therefore, Senate Bill 620 applies retroactively. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305-306.)

In arguing remand would be futile as to Johnson, the People note the trial court cited several aggravating factors: the crime involved great violence and great bodily harm, there was some indication of planning, and the conduct indicates a serious danger to society. The trial court also imposed the maximum sentence on Johnson. We are unpersuaded.

That the trial court imposed the upper term and cited aggravating factors does not foreclose the possibility that it would separately exercise discretion to strike a firearm enhancement. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have

reduced the sentence even if at the time of sentencing it had the discretion to do so”].) We will therefore remand to allow the trial court to exercise its newfound discretion under Senate Bill 620.

II

Bell’s Senate Bill 620 claim

Like Johnson, Bell also contends remand is required due to Senate Bill 620. But as to Bell, the People agree remand is appropriate as the trial court did not clearly indicate it would not have struck Bell’s firearm enhancements. Agreeing with the parties, we will also remand as to Bell.

III

Bell’s claim regarding the trial court’s failure to state reasons when imposing consecutive terms

Bell next contends the trial court abused its discretion in imposing a consecutive term on count three without stating reasons on the record. He maintains remand is required because the circumstances indicate the trial court would likely have imposed a concurrent sentence. While acknowledging his trial counsel never objected to the trial court’s failure to state reasons, he maintains his challenge is still cognizable on appeal because he had no meaningful opportunity to object prior to the imposition of sentence. We disagree.

A. Background

Prior to Bell’s sentencing, a probation report was prepared. The report recommended a 13-year four-month aggregate term: 12 years for count one, a concurrent term for count two, and a consecutive one-year four-month term for count three. The trial court ultimately imposed that term.

At sentencing, the trial court noted it had received and considered the probation reports for both defendants—and confirmed the parties had too. It then asked both Bell’s and Johnson’s counsel to comment on “the sentence that’s being recommended here.”

Bell's attorney argued the low term recommended by probation was appropriate. He maintained the 13-year four-month sentence was excessive, but added, "[U]nfortunately, I don't believe the Court has any discretion to impose anything less than 13 years, four months."⁴

The court thereafter sentenced defendants. As to Bell the trial court judge noted, "I'm prepared to follow the recommendation of probation." The court, citing the nature of robbery where the clerk was shot, noted Bell's conduct could arguably warrant at least a middle term. The court also noted Bell's youth and nonexistent criminal record. The court then imposed the aggregate 13-year four-month term. It did not state reasons for imposing a consecutive term on count three.

B. Analysis

Claims involving a trial court's failure to state reasons when making discretionary sentencing choices are subject to forfeiture. (*People v. Boyce* (2014) 59 Cal.4th 672, 730-731; *People v. Scott* (1994) 9 Cal.4th 331, 356.) That is, however, subject to the parties receiving a "meaningful opportunity to object." (*Scott*, at p. 356.) Parties have such an opportunity if, at any time during sentencing, the trial court describes the sentence it intends to impose and the reasons for it, and the court then considers the parties' objections before the actual sentencing. (*Boyce*, at p. 731.) "The court need not expressly describe its proposed sentence as 'tentative' so long as it demonstrates a willingness to consider such objections. . . . [¶] It is only if the trial court fails to give the parties any meaningful opportunity to object that the *Scott* rule becomes inapplicable." [Citation.]" (*Boyce*, at p. 731.)

⁴ Johnson's attorney asked the court to run the terms for counts one and two concurrently. Counsel added: "If the Court is inclined to sentence Mr. Johnson consecutively on Count 1 and 2 on top of Count 3, then I would ask the Court to run Counts 1 and 2 concurrent, as it's essentially one course of conduct and one crime."

Here, the parties were not deprived of a meaningful opportunity to object. The probation report outlined the sentence that was ultimately imposed. The trial court noted it had considered the report and invited Bell's and Johnson's counsel to comment on "the sentence that's being recommended here."

Though the trial court did not expressly state that it intended to impose the recommended sentence, the parties apparently understood that was the case: Bell's attorney expressed that he largely agreed with the recommended term; Johnson's attorney requested a more lenient sentence than the one recommended. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 ["The court need not expressly describe its proposed sentence as 'tentative' so long as it demonstrates a willingness to consider such objections"].)

Because the parties had a meaningful opportunity to object to the recommended term, the failure to request a statement of reasons forfeits Bell's claim on appeal. (See *People v. Gonzalez, supra*, 31 Cal.4th at p. 751.)

Anticipating that conclusion, Bell argues his trial counsel rendered ineffective assistance in failing to object. We disagree. Assuming *arguendo* the failure to object constituted ineffective assistance, Bell cannot establish prejudice. (See *People v. Maury* (2003) 30 Cal.4th 342, 389 [to establish prejudice for purposes of a claim of ineffective assistance "the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' "].)

Three factors affecting the decision to impose a consecutive term are enumerated by rule 4.425 of the California Rules of Court: "(1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(1)-(3).) Here, with two separate robberies involving different stores, different victims, different violent acts or threats, and different loot, the factors uniformly tilt toward a consecutive sentence.

And that the victim in count three was seriously injured further weighs in support of a consecutive term.⁵ (See Cal. Rules of Court, rule 4.425(b) [permitting consideration of circumstances in aggravation not used to impose an upper term].)

In sum, there is not a reasonable probability of a more favorable result.⁶ Bell's claim of ineffective assistance accordingly fails.

IV

Several sentencing and clerical errors require correction

Finally, several sentencing and clerical errors require correction. First, Bell and the People contend that in sentencing Bell on count two, the trial court erroneously imposed a concurrent one-third-the-middle term along with a one-third enhancement—rather than a full term and enhancement. We agree. (*People v. Quintero, supra*, 135 Cal.App.4th at p. 1156, fn. 3 [“Because concurrent terms are not part of the principal and subordinate term computation under section 1170.1, subdivision (a), they are imposed at the full base term, not according to the one-third middle term formula”].) We will modify the judgment to impose the low term along with the full enhancement.

Second, we note the abstract of judgment for Bell does not reflect the sentence imposed. It reflects an aggregate term of 13 years, rather than 13 years four months. It

⁵ Bell's counsel's statement, “I don't believe the Court has any discretion to impose anything less than 13 years, four months,” was likely an inartful articulation of the absence of anything supporting a concurrent term.

⁶ Bell also maintains the trial court was likely unaware it had discretion to impose a concurrent sentence, noting the trial court failed to correct counsel's statement that “I don't believe the Court has any discretion to impose anything less than 13 years, four months.” Bell's position is belied by, among other things, the fact that Johnson's counsel argued for running counts one and two concurrently and the fact that the probation report recommended running count three consecutively and cited rule 4.425 of the California Rules of Court, which provides “[f]actors affecting the decision to impose consecutive rather than current sentences.”

also reflects a 12-year firearm enhancement on count one, rather than a 10-year enhancement.

Additionally, the abstract of judgment incorrectly indicates Bell was convicted of all counts by the court, not by jury.

Next, our review has uncovered a sentencing error as to Johnson. In imposing the aggregate sentence, the trial court designated count one as the principal term. But count three, with its accompanying 25-year-to-life enhancement, carried the longer term. Thus, count three should have been designated the principal term. (§ 1170.1, subd. (a); *People v. Brady*, *supra*, 34 Cal.App.4th at p. 70, fn. 9 [“The principal term ‘consists of the greatest term imposed including the enhancements which attach to that particular offense’ ”].)

Therefore, we will modify the judgment as to Johnson to make count three the principal term, imposing a 10-year term (the upper term doubled for the strike) along with a 25-year-to-life enhancement. (§ 12022.53, subd. (d).) Concomitantly, on count one, now a subordinate term, the judgment is modified to impose a consecutive two-year term (one-third the middle, doubled for the strike) along with a four-month term (one-third the term) for the section 12022, subdivision (a)(1) enhancement.

Additionally, the abstract of judgment incorrectly indicates Johnson was convicted of all counts by the court, not by jury.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under Senate Bill 620 as to both Bell and Johnson.

The judgment is modified as to Bell by imposing a two-year low term (§ 211) along with a 10-year firearm enhancement (§ 12022.53, subd. (b)) on count two, to run concurrently with the remainder of Bell’s sentence.

Additionally, the abstract of judgment as to Bell is to be corrected to impose a 10-year, rather than a 12-year, enhancement (§ 12022.53, subd. (b)) on count one.

Finally, the proper boxes are to be checked for all counts to indicate Bell's convictions were by jury.

The judgment is modified as to Johnson by imposing a 10-year term (the upper term doubled for the strike) along with a 25-year-to-life firearm enhancement (§ 12022.53, subd. (d)) on count three. Count one is modified by imposing a consecutive two-year term (one-third the middle, doubled for the strike) along with a four-month term (one-third the term) for the section 12022, subdivision (a)(1) enhancement.

Additionally, the proper boxes are to be checked for all counts to indicate Johnson's convictions were by jury.

Consistent with this opinion, the trial court is directed to prepare amended abstracts reflecting those modifications and corrections, as well as any sentencing changes on remand. The trial court is further directed to forward a certified copy of each abstract of judgment to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Robie, J.

Butz, J.